United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7637

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-7637

To Be Argued By
Lewis F. Tesser

CHARLES D. REICH,

Appellant,

-v-

DOW BADISCHE COMPANY and
DOW CHEMICAL COMPANY,

Appellees.

APPEAL

REPLY BRIEF FOR THE APPELLANT

COLES WEINER TESSER, P.C.
Attorneys for Appellant
1775 Broadway
New York, New York 10019
(212) 586-5212

SUPPLEMENTAL TABLE OF CASES AND AUTHORITIES

Cases

COLES
WEINER
TESSER, P.C.
ATTORNEYS AT LAW
1775 BROADWAY
NEW YORK, N. Y. 10019

POINT I

ORAL NOTICE OF INTENT TO SUE IS NOT INSUFFICIENT AS A MATTER OF LAW

The appellees have misunderstood the contention of the appellant on this point. It is not the appellant's contention that oral notice of intent to sue should always be sufficient as a matter of law -- clearly, the giving of written notice is preferable and should be encouraged. Rather, the appellant asserts that the court has the power to inquire into the equities of a given case and to determine, if appropriate, that oral notice may be sufficient.

In Woodford v. Kinney Shoe Corp., 369 F. Supp. 911 (N.D. Ga. 1973), discussed in appellant's previous brief, the Court held that oral notice was sufficient. Similarly, in Sutherland v. SKF Industries, Inc., 419 F. Supp. 610 (E.D. Pa. 1976), the court held that oral notice may be sufficient. See, also, Smith v. Jos. Schlitz Brewing Company, 419 F. Supp. 770 (D.N.J. 1976), in which no notice of intent to sue was given; the court determined that the initial complaint could be deemed "notice".

The appellees distinguish Woodford by pointing to the fact that the plaintiff in Woodford was misled. But in the instant action, the appellant has claimed from the inception of this action that he was misled by Department of Labor officials who (upon receiving the appellant's oral statements that he intended to sue) never told him that the notice would have to be in writing. (Conversely, in Hayes v. Republic Steel Corp., 531 F.

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P.C.
ATTORNEYS AT LAW
1775 BROADWAY
NEW YORK, N. Y. 10019

2d 1307 (5th Cir. 1976), cited by the appellees as a decision "requiring a writing", the plaintiff was specifically told that he "would have to get it [a written notice] in just a few days, that the time was running out." Ibid, p. 1312). The appellees also point to two unofficially reported District Court cases that have criticized the Woodford decision. However, Woodford has often been favorably cited, see, eg., Moses v. Falstaff Brewing Corporation, 525 F. 2d 92, 93 (8th Cir. 1975); Dartt v. Shell Oil Co., 539 F. 2d 1256, 1260 (10th Cir. 1976), cert. granted, No. 76-678, 45 U.S.L.W. 3554 (Feb. 22, 1977).

The appellant does not request that this Court determine that he gave sufficient notice of intent to sue, he only requests the opportunity to present evidence to the District Court. He seeks to prove that in the circumstances of his case he gave sufficient oral notice.

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ATTORNEYS AT LAW
1775 BROADWAY
NEW YORK, N. Y. 10019

POINT II

THE CLEAR LANGUAGE OF THE AGE DISCRIMINATION EMPLOYMENT ACT DOES NOT REQUIRE PLAINTIFF REICH TO EXHAUST STATE ADMINISTRATIVE PROCEDURES BEFORE THE COMMENCEMENT OF THIS FEDERAL ACTION, BOTH AS A MATTER OF LAW AND ON THE FACTS OF THIS CASE.

A. INTRODUCTION

The appellees contend that since the appellant Reich did not timely seek relief from the New York State Division of Human Rights, he is precluded from bringing this federal suit. Section 14(b) of the ADEA, 29 U.S.C. §633(b), provides as follows:

> §633. Federal-State relationship
> (b) Limitation of federal action upon commencement of State proceedings. In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 7 of this Act [29 USCS § 626] before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated. Provided, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority. (Dec. 15, 1967, P.L. 90-202, §14, 81 Stat. 607).

Appellees read the language of §633(b) as requiring that in any state which has enacted legislation prohibiting discrimination in employment on the basis of age, the aggrieved individual must

COLES
WEINER
TESSER,
P.C.

ATTORNEYS AT LAW
1775 BROADWAY
NEW YORK, N. Y. 10019

first allow the state agency charged with enforcing such legislation an initial threshold period of sixty days to attempt to resolve the controversy.*1 Failure to take such steps within the statutory period of 1 year, McKinneys New York Executive Law §287(5),*2 they argue, constitutes an absolute bar against the maintenance of a federal suit by an aggrieved individual, despite any steps he or she may have taken to preserve his federal rights through the Department of Labor. The state must first be given 60 days to act on the complaint, they argue, regardless of whether or not the state action is untimely or otherwise jurisdictionally defective. Otherwise, appellees contend, federal rights and remedies are forever lost.*3

Appellant urges that this construction of the language of §633(b) is incorrect on its face and flies directly in the face of the intent of Congress in enacting the ADEA. Appellant will show, by this argument, that there is no indication whatsoever in the language of that statute to the effect that the commencement of state proceedings is a prerequisite to federal jurisdiction and that the language of §633(b) is regulatory in nature. (Point B).

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*1 McKinneys Executive Law §296, Unlawful discriminatory practices. It shall be an unlawful discriminatory practice:(a) For an employer, because of the age, race, creed, color, national origin or sex of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

*2 McKinneys Executive Law §297. Procedure. Any complaint filed pursuant to this section must be so filed within one year after the alleged unlawful discriminatory practice.

*3 In their brief, the appellees acknowledge that if the government misled the appellant, his present legal status might be different. In fact, the appellant was misled by the government, and he merely seeks an opportunity to present these facts to the District Court.

COLES
WEINER
TESSER,
P.C.

ATTORNEYS AT LAW
1775 BROADWAY
NEW YORK, N. Y. 10019

In addition the appellant will show that even if the state filing provision of §633(b) is deemed to be "jurisdictional", he should have been allowed an opportunity, in the District Court, to prove facts that would equitably excuse his failure to file with the state agency.*4 (Point C)

In fact, the appellees have all but conceded that the appellant should have had such an opportunity. Point I(c) of their Brief, pp 15-18, consists of an argument on the equities of this case, relying solely on the documents of record, (see also, Appellees Brief, pp. 5-6); however, the appellant has never had an opportunity to explain and supplement these documents.

B. COMMENCEMENT OF STATE PROCEEDINGS IS NOT A JURISDICTIONAL PREREQUISITE UNDEP SECTION 633(b) TO APPELLANT REICH'S MAINTENANCE OF HIS FEDERAL ACTION

1. CASE LAW

Appellant urges that his failure to timely commence state administrative proceedings does not constitute a bar to his federal suit. The growing weight of authority has held that the provisions of §633(b) are not jurisdictional and nearly all courts have refused to dismiss an aggrieved individual's federal suit under circumstances such as those presented by Appellant Reich. See especially, Smith v. Jos. Schlitz Brewing Co., 419 F. Supp. 770 (D.N.J. 1976) and Sutherland v. SKF Industries, Inc.,

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*4 Upon retention by the appellant, his counsel immediately prepared and filed charges with the New York State Division of Human Rights. As has been repeatedly pointed out by Appellees, these charges were untimely and have been subsequently rejected by the State Division. They were thus void, ab initio. If the appellant had waited for sixty days from the filing of those charges, his time within which to file his federal suit would have expired. The appellant requests that the Court not permit this hasty attempt of appellants counsel to comply with what they believed to be procedural requirements to interfere with the appellants opportunity to explain why he did not timely file with the State Division.

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WEINER
TESSER,
P.C.
ATTORNEYS AT LAW
1775 BROADWAY
NEW YORK, N. Y. 10019

419 F. Supp. 610 (E.D. Pa. 1976). See also, Magalotti v. Ford Motor Co., __ F. Supp. __, 12 EPD ¶ 11266 (E.D. Mich. 1976).

Like the appellees in the instant action, the defendant in Vasquez v. Eastern Air Lines, 405 F. Supp. 353 (D.P.R. 1975), had based their argument upon an interpretation and construction of ADEA §§ 7 and 14, 29 U.S.C. §§ 626(d), 633(6) which would hold prior resort to state remedies as a jurisdictional prerequisite to the federal action. In rejecting this reading of §633(b), and denying defendant's motion for summary judgment, the Court concluded that "we should adopt a straight forward approach and interpretation of this legislation so as to permit immediate recourse to our Court."

This conclusion is in agreement with Judge Garth's concurring opinion in the earlier Third Circuit case of Goger v. H.K. Porter Company, Inc., 492 F. 2d 13 (3rd Cir. 1974). Goger involved a suit brought under the ADEA against the plaintiff's former employer for discriminatorily terminating her employment. The plaintiff in Goger timely filed a notice of intent to sue with the Secretary of Labor and requested that the Secretary fulfill his mediation obligations. These attempts to reach a solution failed and, thereafter, the complainant's counsel was advised that complainant was free to institute her contemplated civil action under ADEA. She at no time sought relief from or commenced proceedings under New Jersey State law through the Division of Civil Rights of the Depart-

COLES
WEINER
TESSER,
P.C.

ATTORNEYS AT LAW
1775 BROADWAY
NEW YORK, N. Y. 10019

ment of Law and Public Safety, the New Jersey agency charged with elimination of unlawful discrimination based on age. At the time of instituting her federal action under the ADEA, any State proceeding would have been time-barred under the New Jersey law which requires all complaints to be filed within 180 days of the alleged act of discrimination. The Court in Goger unanimously reversed the District Court's granting of the defendant's motion to dismiss. The majority opinion found by analogy to the notice provisions of §706 of Title VII, 42 U.S.C. 2000e-5(d), that initial resort to state relief was a requirement which must be met prior to instituting suit in a federal district court, but, nonetheless, the Court remanded the case for a hearing on the merits based on the newness of the Act and the equitable considerations of the plaintiff's situation.*5

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*5 Appellant Reich's equitable considerations, to be considered infra, present a much more compelling case for reversal than is present in Goger, but it is significant to note, at this point, the results of Goger. While seeking to formulate the law in a certain way, i.e., that resort to state proceedings under §633(b) is a jurisdictional prerequisite to institution of a federal suit under ADEA, the majority were not willing to apply their own interpretation if the ultimate result were to deprive the ADEA plaintiff of his or her cause of action.

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WEINER
TESSER
P.C.

ATTORNEYS AT LAW
1775 BROADWAY
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While concurring in the result, Judge Garth firmly rejected the majority's analogy of the notice provisions of ADEA to Title VII.

> "I do not agree that merely because 29 U.S.C. §633(b) of the ADEA is similar in language to 42 U.S.C. §2000e-5(b) of Title VII, they are necessarily subject to the same construction. The various dissimilarities between the two Acts (and in particular the presence of §633(a) [*6] of ADEA, which has no counterpart in Title VII) impel me to the conclusion that there is no requirement that a plaintiff must first attempt to utilize available state remedies before filing suit under the 1967 Act." Id. at 17.

Judge Garth concluded his concurrence by stating that:

> "I do not believe that it was the intent of Congress to require, prior to the institution of a federal action, the commencement of a state proceeding which, under §633(b), need not be concluded, and which in any event would be superceded by the filing of the federal action under §633(a)." Id. at 18.

Appellant asserts that this sounder, more well reasoned construction of §633(b) is compelling, as has been found by the courts in Vasquez, supra, Skoglund v. Singer Co., 403 F. Supp. 797 (D.N.H. 1975), and Bertrand v. Orkin Exterminating Co., F.Supp. (N.D. Ill. 1976), 13 FEP 1447.

While the Bertrand court held that the complainant there need not have sought resort to the agency in any event since it did not possess the requisite enforcement powers as would make it a deferral agency for the purpose of the Act, [*7] 13 FEP at 1451,

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*6 Federal action superseding State action. Nothing in this Act [29 USCS §§621-634] shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this Act [29 USCS §§621-634] such action shall supersede any State action.

*7 This is another popular ground for finding that a complainant's cause of action need not be dismissed, although the court's rationale in reaching such a conclusion has often been confusing or contradictory. Cf. Vasquez, supra, and Curry v. Continental Air Lines, 513 F. 2d 691 (9th Cir. 1975), to be discussed infra.

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Judge Decker felt compelled, in light of the controversy surrounding §633(b), to reach the jurisdictional question. Plaintiff Bertrand's allegations were to the effect that he had been discriminatorily demoted and, in effect, constructively discharged by the defendant in violation of the ADEA. On the defendant's motion to dismiss, after an exhaustive study and discussion of the statutory language, legislative history, differences and analogies to Title VII, and the split of authority in this regard, the court in Bertrand concluded:

> Finally, the court emphasizes that it would not dismiss the instant complaint even if it could be shown that the Illinois remedies satisfy the intent of §633(b) and that this provision in fact establishes a jurisdictional prerequisite for an action under the Federal Age Discrimination Act. Id. at 1311

Thus, Bertrand follows closely the logic first expressed in Skoglund, supra, a case wherein the complainant failed to timely seek relief from the appropriate state agency. The court ruled that a hearing was required to determine whether defendants had complied with the requirements of §627 with respect to posting of ADEA notices, and then went on to state its views with respect to the requirement of state exhaustion:

> I find that although Section 633(b) requires a timely resort to state remedies before a complaint may be filed in federal court, this requirement is not jurisdictional; therefore, plaintiff's failure to notify the Massachusetts Commission Against Discrimination in a timely fashion does not bar him from this court." Skoglund v. Singer Co. supra, 403 F. Supp. at 802.

The court went on to state its belief that even those courts

COLES
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which had held §626(d) to be "jurisdictional" did not mean that the filing provisions were really in fact, "jurisdictional". See e.g., Hiscott v. General Electric Co., 521 F. 2d 632 (6th Cir. 1972); Powell v. Southwestern Bell Telephone Company, 494 F. 2d 485 (5th Cir. 1974). On the contrary, the Court accepted the plaintiff's argument that the term "jurisdiction", when used in a Title VII or ADEA situation is more akin to a statute of limitations interpretation. Thus, Judge Bownes agreed with the logic of Reeb v. Economic Opportunity Atlanta Inc., 516 F. 2d 924 (5th Cir. 1975), a Title VII case rejecting a strict jurisdictional interpretation of filing requirements in remedial and humanitarian legislation:

> We accept the view that the requirements should be analogized to statutes of limitations. Equitable modifications, such as tolling and estoppel, that are applied to them should also be applied here. The act contemplates that complaints initiating EEOC proceedings will be brought in the first instance by laymen. It is reasonable, therefore, for courts to refuse to apply technical rules of common law pleading to charges filed initially with the Commission. Id. 516 F. 2d at 928.

See also, Skoglund v. Singer Co., 403 F. Supp. 797 (D.N.H. 1975), Bertrand v. Orkin Exterminating Company, F. Supp. (N.D. Ill. 1976), 13 FEP 1447, Vasquez v. Eastern Air Lines, 405 F. Supp. 1353 (D. P.R. 1975).

Thus, appellant would urge this court that the proper construction of §633(b) is that it is purely regulatory, in the interests of federalism and does not set up a new jurisdictional element beyond those set forth in §626(c-e).

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TESSER
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1775 BROADWAY
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It is imperative that this Court note that in not one of these cases did the court's holding actually deprive the complainant of his or her day in Court. Whether on grounds of equity, See Goger, inadequacy of the state procedure, See Curry, or a state statute which would seemingly run contra to the expressed legislative purpose of ADEA, See Bertrand, in each case the court found a means by which to circumvent its own construction of §633(b) and reach the merits of the complainant's claim. Further, the cases cited by Appellees in their Brief which would seek to impose a restrictive construction by analogy to Title VII are of little support. Crosslin v. Mountain State Tel. & Tel., 422 F. 2d 1028 (9th Cir. 1970) was vacated and remanded by the United States Supreme Court, 400 U.S. 1004 (1971) following suggestions for proper handling of the case in a brief submitted as amicus curiae by the Solicitor General. Love v. Pullman, 404 U.S. 522 (1972), in a Title VII setting, follows the same equitable doctrines put forth by Skoglund as appropriate under the ADEA, in holding that procedural requirements should not be *8

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*8 Likewise, Pacific Maritime Association v. Quinn, 465 F. 2d 108, 110-111 (9th Cir. 1972) is of little support for Appellees, but, on the contrary, of great benefit for one such as Appellant Reich who sought repeatedly to initiate State proceedings but with no success:

> If (notwithstanding sufficient expression of state interest) state representatives choose to do nothing with a complaint duly filed with them and accordingly terminate state proceedings - whether with a helpless shrug of the shoulders or a turning out of the pockets, or with no explanation whatsoever - the federal purposes have been fully met. If state representatives fail to live up to the apparent state expectations, or even the clear requirements of state law, a state problem may be presented but nothing of federal concern. The state has had its opportunity and the requirements of the Act have been satisfied.

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WEINER
TESSER,
P.C.

ATTORNEYS AT LAW
1775 BROADWAY
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strictly applied in remedial legislation, especially with respect to non-lawyers.

Appellees can find no support for their argument that §633(b) should be read as barring Appellant Reich's cause of action in cases such as Olson v. Rembrandt Printing Co. 511 F. 2d 1233 (8th Cir. 1975) or Dubois v. Packard Bell Corp. 470 F. 2d 973 (10th Cir. 1972), since in those cases, plaintiff failed to file a claim with either the EEOC or the appropriate state agency within 180 days. See also Goodman v. Heublein Brewing Inc. F. Supp. (D. Conn. 1976), 13 FEP 27, for a similar holding under ADEA. Such is hardly the situation in the instant case as appellant Reich repeatedly informed the Department of Labor of his intention to sue appellees.*9

2. STATUTORY CONSTRUCTION

The courts, in discussing the correct construction of §633(b), have placed great weight and significance on the schematic framework and structure of §§626(d) and 633(b). Section 633 (b) is contained under the heading "Federal-State relationship" and is structurally set apart from the jurisdictional requirements

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*9 Likewise, Appellee's reliance upon Fitzgerald v. New England T & T Co., 416 F. Supp. 617 (D. Mass. 1976) 12 FEP 1781, is inapposite since Appellant does not seek to toll the filing period, having timely expressed his intention to the Secretary of Labor. Ott v. Midland-Ross Corp, 523 F. 2d 1369 (6th Cir. 1975) stands precisely for the proposition that equitable considerations will toll the filing provisions, and Moore v. Sunbeam Corp., 459 F. 2d 811 (7th Cir. 1972) does no more than highlight the differences in procedures for handling complaints between the EEOC and DOL, further buttressing Appellants equitable arguments. See infra.

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WEINER
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1775 BROADWAY
NEW YORK, N. Y. 10019

created by Congress as prerequisites for the maintenance of a suit under the Act. These jurisdictional prerequisites are contained in §626(c-e) which do include in its subheadings the terms "jurisdiction" and "timeliness". Further, there is no mandatory language with respect to State exhaustion or commencement in §633(b), nor is there any indication that failure to take such steps at the state level would, in any way interfere with the court's power to hear and decide any suit brought before it under the ADEA. Likewise, the only reference to deferral to state proceedings in the jurisdictional section of the ADEA, §626, again speaks strictly in terms of regulating the relations between federal and state agencies and the federal courts.*10 §626(d)(2) states quite simply that in those cases where §633(b) applies, i.e.,

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*10 The only reference to state agency deference in §626 lies in subsection (d), which deals with the timeliness of filing a notice of intent to sue with the Secretary of Labor. This section also contains no mandatory language which would require prior state proceedings. Again, as in §633(b) the language is merely regulatory in nature, providing a lengthier time within which to file a notice of intent to sue with the Secretary of Labor in those situations where state relief is sought:

> §626. Recordkeeping, investigation, and enforcement
> (d) Civil actions-Notice to Secretary-Timeliness-Conciliation, conference, and persuasion. No civil action may be commenced by any individual under this section until the individual has given the Secretary not less that sixty days' notice of an intent to file such action. Such notice shall be filed-
> (1) within one hundred and eighty days after the alleged unlawful practice occurred, or
> (2) in a case to which section 14(b) [29 U.S.C.S. §633(b)] applies, within three hundred days after the alleged unlawful practice occurred or with thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

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WEINER
TESSER
P.C.
ATTORNEYS AT LAW
1775 BROADWAY
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in those situations where a proceeding has been commenced under state law, notice must be filed within 300 days after the alleged unlawful practice has occurred or within 30 days after receipt of a notice of termination, whichever is earlier. Again, the language of the statute, is merely regulatory in nature, and it contains no indication of a limitation on the courts' power where an aggrieved individual has chosen not to initiate state proceedings. Thus the court in Vasquez felt compelled to conclude that:

> "Section f does not make the filing of an administrative charge with the appropriate State agency a jurisdictional step. Its only requirement in the case of an aggrieved individual is that the Secretary of Labor be afforded timely notice of an intent to file suit. Powell v. Southwestern Bell Telephone Company, 494 F. 2d 485, 488 (CAS, 1974). The sole purpose of this requirement is to enable the Secretary to eliminate the alleged violation through informal method of conciliation, conference and persuasion, if that is possible, before suit is filed, and to ensure that the Secretary extends his conciliation resources only on alleged unlawful practices which are reasonably current.
>
> In contrast, Section 14 of ADEA does not set forth any jurisdictional steps for instituting suit, but deals solely with the relationship between Federal and State laws". Vasques, supra, 405 F. Supp. at 1355.

The logic of this interpretation has been found to be compelling by the courts in Bertrand, Skoglund and Goger, (Garth, J. concurring) supra, and Appellant urges that this is the interpretation which should be accepted by this court. *11

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*11 Again, Appellant wishes to stress that even those courts which have chosen not to follow the logic of Vasquez and the concurrence in Goger, have acknowledged that equitable consideration should be taken into account in deciding each individual case. See e.g., Berry v. Crocker National Bank, F. Supp. (N.D. Ga. 1976), 13 FEP 673, 678 and Vaughn v. Chrysler Corp., 382 F. Supp. 143 (E.D. Mich. 1974) wherein Chief Judge Koess agrees that the requirements of §633(b) may be waived under the principle of equity.

C. THE APPELLANT SHOULD HAVE HAD HIS DAY IN COURT TO EXPLAIN HIS FAILURE TO TIMELY FILE WITH THE STATE AGENCY

In this brief, the appellant has repeatedly stressed that even those Courts that have held the provisions of §633(b) to be jurisdictional have also considered the equitable arguments of the plaintiff. In the instant case, the appellant did not even have an opportunity to present his equitable arguments.

The lost opportunity is underscored by the appellees arguments on contested facts that bear directly on such equitable considerations. Incredibly, the appellees argue, on page 20 of their brief that "nor was Mr. Reich unaware of the provisions of §633(b) of the ADEA". It is difficult to understand how the appellees know such information because, in fact, the appellant was absolutely unaware of the said provisions. The appellees place great weight on the "fact" (Brief, pp. 16-17) that the appellant was not misled by the Department of Labor; in fact, he was misled, and he can prove it. The Appellees repeatedly point to an ADEA pamphlet received by the appellant, however, the appellees neglect to point out that the said pamphlet makes no reference whatsoever to any possible state filing requirements.*12 The appellees also fail to discuss that the appellant had no less than four timely contacts with the appropriate state agency wherein he was discouraged from filing with the state because the complainant had gone to the federal agency. The appellees also argue the facts as they believe them to be. (Brief, pp. 5-6)

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*12 The appellees also point to "actual notice" (Brief, p. 17) received by the appellant of the filing requirement that constitutes the other issue in this appeal. They neglect to point out that the only timely notice received by the appellant did not point out that the appellant was not in compliance with all filing requirements.

COLES
WEINER
TESSER,
P.C.

ATTORNEYS AT LAW
1775 BROADWAY
NEW YORK, N. Y. 10019

These facts are relevant, but they are totally prejudicial unless the appellant is afforded the opportunity to present evidence to explain the documents of record.

In view of the cases discussed above, the appellant is convinced that he can excuse his failure to timely file with the state agency to the satisfaction of the District Court. For example, through his own testimony, and that of the responsible state and federal officials with whom he was timely dealing, he can prove that he was informed that he need not pursue any state remedies.

The point is that all previous courts have at least listened to the respective plaintiffs. The appellant merely requests that opportunity to be heard.

COLES
WEINER
TESSER, P.C.
ATTORNEYS AT LAW
1775 BROADWAY
NEW YORK, N. Y. 10019

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

LEWIS F. TESSER, being sworn, says: I am not a party to this action; I am over 18 of age; I reside at 1775 Broadway, New York, New York 10019.

On May 10, 1977 I served the within REPLY BRIEF FOR THE APPELLANT upon KAYE, SCHOLER, FIERMAN, HAYS & HANDLER the attorneys for Appellees in this action at 425 Park Avenue, New York, New York 10022, the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid, properly addressed wrapper, in an official depositary under the exclusive care and custody of the United States Postal Service within the State of New York.

Lewis F. Tesser

Lewis F. Tesser

Sworn to before me
this 10th day of May, 1977

Kristine M. Lardner

KRISTINE M. LARDNER
Notary Public, State of New York
No. 31-4635594
Qualified in New York County
Commission Expires March 30, 1978

COLES & WEINER
ATTORNEYS AT LAW
1775 BROADWAY
NEW YORK, N. Y. 10019